NEWACRES SDN. BHD.

v.

SRI ALAM SDN. BHD.

SUPREME COURT, KUALA LUMPUR
MOHD. JEMURI SERJAN CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. YUSOF MOHAMED SCJ
[SC CIVIL APPEAL NO. 02-117-91]
18 OCTOBER 1991

ARBITRATION: *Arbitration clause in joint venture agreement - Whether Scott v. Avery clause - Whether entitled in law to commence action in Court instead of proceeding to arbitration - Conduct which waived these rights - Absence of application for stay - Arbitration Act 1950, s. 6.*

CIVIL PROCEDURE: *Originating summons for various declarations - Summons in chambers to strike it out after pleadings had closed and matter had been set down for trial - Interpretation of joint venture agreement - Existence of collateral warranty - Fiduciary relationship - Proper recourse for trial of preliminary matter - Meaning of 'cause of action' - Extrinsic evidence - Rules of the High Court 1980, O. 18 rr. 11, 19, O. 33 r. 2.*

The respondent took out a notice of motion against 5 defendants, one of whom was the appellant in this action, seeking an account of all sums belonging to it which was in the defendants' possession, an injunction to restrain the appellant from carrying selling, transferring or disposing of any buildings on the said land and a mandatory injunction compelling the appellant to transfer to the respondent the buildings and the land, which were the subject of a joint venture agreement entered into between the parties.

By consent, the action was stayed and the respondent was required to apply to the Court for an interpretation and construction of the joint venture agreements as to the respective entitlements of the parties. Consequently, the respondent took out an originating summons seeking various declarations as to its rights under the joint venture agreement.

The appellant then took out a summons in chambers to strike out the respondent's originating summons, during which appellant's Counsel sought a stay pending formulation of questions by the parties. By consent, the parties undertook to file a list of issues which they considered relevant. Numerous affidavits were filed by both parties.

As a result of various meetings between the parties, the respondent and the appellant respectively filed a statement of claim and a statement of defence and counterclaim. A summons for directions was filed by the respondent and an order was made for the setting down of the suit for trial within 30 days of the date of the order.

One of the issues raised in the statement of claim was whether there existed a collateral agreement between the parties antecedent to the joint venture agreement; and whether the appellant was under a fiduciary duty to the respondent to act honestly, responsibly and fairly in all its dealings with the respondent, and whether such duty had been breached.

The appellant argued that as the contract in respect of the joint venture agreement had not been terminated, the respondent had no cause of action and therefore no relief in the form of payment of money can be made. In other words, that the matters complained of by the respondent are anticipatory and therefore there is no cause of action.

The appellant's application to dismiss the respondent's action was dismissed by the learned Judge pursuant to O. 18 r. 19 of the Rules of the High Court 1980, on the basis of delay on the appellant's part in making the application to strike off the suit. Hence this appeal.

In the High Court, Counsel for the appellant raised two main objections:

(a) that the plaintiff (respondent) was suing for payment of money while the contract was being performed;

(b) the plaintiff had not referred the dispute to arbitration as provided for in clause 23 of the joint venture agreement; and

(c) the learned Judge was wrong in holding that the respondent had a cause of action in fiduciary duty without regard to the true nature of the claim of the respondent.

Held:

[1] It is evident both from the notes of proceedings in the High Court and in the arguments of the learned Counsel for the appellant that the application in the lower Court was in respect of O. 33 rr. 2 and 5 read together with O. 18 r. 11 because at the time when this application was argued before the High Court, the pleadings had been closed and the date of the trial of the issues had already been fixed. It must have been in the mind of the learned Counsel for the appellant that it was too late for him to apply to strike out the originating summons under O. 18 r. 19 at that stage and the only proper recourse would be to apply for the trial of preliminary matter on the question of law before the trial of the issues.

[2] Two courses are open to the appellant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the respondent to relief. One method is to raise the question of law as directed by O. 33 r. 2 read together with O. 18 r. 11 and the other is to apply to strike out the statement of claim under O. 18 r. 19. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that a Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the respondent to what he asks. This appeal was considered on the basis that this is an application for the trial of preliminary issues before the trial itself. O. 33 r. 2 is suitable if there is a point of law which, if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities.

[3] The modern definition of a 'cause of action' is a factual situation the existence of which entitles a person to obtain from the Court a remedy against another person.

[4] The existence of representation of which induced the respondent to enter into the joint venture agreement, the existence of a collateral warranty and the fiduciary relationship between the parties are issues which cannot be decided by recourse to O. 33 r. 2 read together with O. 18 r. 11 of the Rules of the High Court, but are issues that must be proved by extrinsic evidence. As such, these are matters that ought to be tried at the trial proper. The issues in this case are riddled with complexities and the facts are in dispute so that recourse to O. 33 r. 2, should not be had in the first place.

[5] Clause 23 of the joint venture agreement does not contain a *Scott v. Avery* clause. Therefore the question is whether on the face of clause 23, the respondent is entitled in law to go to Court instead of referring the dispute to arbitration. On case authorities, it is clear that the respondent can still go to Court, provided that before the institution of an action, no award has been made by an arbitrator.

[6] The appellant's conduct in filing affidavits in reply to the affidavits of the respondent when they filed the issues as ordered by the trial Judge and the filing of the statement of defence and counterclaim, by its very nature, amounts to a waiver of the rights of the parties to go to arbitration. Neither did the appellant have recourse to s. 6 of the Arbitration Act to apply for a stay of the proceedings thereby reinforcing the argument that it had abandoned its right to go to arbitration, but submitted itself to the jurisdiction of the Court.

[Two objections dismissed; appeal dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

PROSEDUR SIVIL: *Saman permulaan bagi beberapa perisytiharan - Saman dalam kamar untuk membatalkan saman permulaan selepas pliding ditutup dan kes ditetapkan untuk perbicaraan - Pentafsiran perjanjian usahasama - Kewujudan "collateral warranty"- Perhubungan fidusiari - Prosedur yang betul bagi membuat permohonan perbicaraan permulaan - Makna `kausa tindakan' - Keterangan extrinsik - Kaedah-kaedah Mahkamah Tinggi 1980 Aturan 18, k.11, 19, Aturan 33 k. 2.*

TIMBANGTARA: *Fasal timbangtara dalam perjanjian usahasama - Sama ada fasal Scott lwn. Avery - Sama ada berhak di sisi undang-undang untuk mengambil tindakan Mahkamah sebagai ganti kepada prosiding timbangtara - Kelakuan yang mengenepikan hak-hak tersebut - Ketiadaan permohonan untuk menggantung prosiding Mahkamah - Akta Timbangtara 1950 s. 6.*

Responden telah mengambil satu notis usul terhadap 5 defendan di mana perayu dalam tindakan ini adalah seorang daripada defendan tersebut. Responden menuntut satu akaun semua jumlah wang kepunyaannya yang berada dalam simpanan perayu, satu injunksi untuk menahan perayu daripada menjual, memindah atau melupuskan mana-mana bangunan yang terletak di atas tanah tersebut dan injunksi mandatori untuk memaksa perayu memindah-milik kepada responden bangunan-bangunan tersebut serta tanah yang terlibat dalam perjanjian usahasama di antara semua pihak.

Secara persetujuan tindakan itu telah digantung dan responden telah dikehendaki supaya memohon kepada Mahkamah bagi pentafsiran perjanjian usahasama itu bagi menentukan hak kepentingan kedua-dua pihak. Seterusnya responden mengambil satu saman permulaan menuntut beberapa perisytiharan mengenai haknya di bawah perjanjian usahasama itu.

Perayu pula mengeluarkan satu saman dalam kamar bagi membatalkan saman permulaan responden dalam mana Peguam perayu memohon penggantungan perbicaraan bagi membolehkan kedua-dua pihak menggubal soalan-soalan. Secara persetujuan kedua-dua pihak berjanji bagi memfailkan satu senarai isu-isu yang mereka fikirkan relevan. Kedua-dua pihak telah memfailkan beberapa afidavit.

Hasil daripada beberapa perjumpaan di antara kedua-dua pihak responden dan perayu masing-masing telah memfailkan pernyataan tuntutan, pernyataan pembelaan dan tuntutan balas. Satu saman untuk arahan telah difailkan oleh responden dan satu perintah telah dikeluarkan bagi menetapkan kes itu bagi perbicaraan dalam tempoh 30 hari dari tarikh perintah dikeluarkan.

Satu daripada isu yang ditimbulkan adalah sama ada terdapat satu perjanjian kolateral di antara pihak sebelum perjanjian usahasama dan sama ada perayu mempunyai tanggungjawab fidusiari terhadap responden bagi bertindak secara jujur, bertanggungjawab dan secara adil dalam semua urusan dengan responden; juga sama ada tanggungjawab tersebut telah dimungkiri.

Perayu menghujah bahawa oleh sebab kontrak berkait dengan perjanjian usahasama itu belum ditamatkan responden tidak mempunyai kausa tindakan dan oleh itu tiada relif dalam bentuk wang boleh dibuat. Dalam maksud lain perkara-perkara yang diadukan oleh responden adalah 'anticipatory' dan oleh itu tidak terdapat kausa tindakan.

Permohonan perayu untuk membatalkan tindakan responden telah ditolak oleh Hakim yang arif menurut Aturan 18 Kaedah 19, Kaedah-kaedah Mahkamah Tinggi 1980 (KMT), atas alasan kelewatan perayu dalam membuat permohonan bagi membatalkan guaman tersebut. Justeru itu rayuan ini dibuat.

Di Mahkamah Tinggi Peguam perayu menimbulkan dua bantahan utama:

(a) bahawa plaintif (responden) mengambil tindakan undang-undang bagi pembayaran wang semasa kontrak itu sedang dilaksanakan;

(b) plaintif tidak merujuk pertikaian itu kepada timbangtara seperti yang tersebut dalam fasal 23 perjanjian usahasama itu; dan

(c) Hakim yang arif telah mengambil pandangan yang salah dalam menentukan bahawa responden mempunyai kausa tindakan mengenai tanggungjawab fidusiari tanpa memberi pertimbangan kepada jenis tuntutan responden yang asal.

Diputuskan:

[1] Adalah jelas daripada nota prosiding dalam Mahkamah Tinggi dan hujah-hujah Peguam perayu yang bijaksana bahawa permohonan di Mahkamah itu adalah berkait dengan Aturan 33 Kaedah-kaedah 2 dan 5 (KMT) yang dibaca bersama Aturan 18 Kaedah 11 (KMT) kerana semasa permohonan ini di hadapkan ke Mahkamah Tinggi, pliding telah ditutup dan tarikh perbicaraan isu-isu telah ditetapkan. Perkara ini mesti berada dalam fikiran Peguam perayu yang bijaksana bahawa sudah terlambat untuk membuat satu permohonan membatalkan saman permulaan di bawah Aturan 18 Kaedah 19 (KMT) di peringkat itu dan cara yang betul adalah memohon supaya perbicaraan permulaan perkara tersebut berdasarkan soal undang-undang diadakan sebelum perbicaraan isu-isu diadakan.

[2] Dua tindakan terbuka kepada perayu yang ingin menimbulkan soal sama ada setelah pernyataan tuntutan dibuktikan ia memberi hak kepada responden bagi mendapatkan relif. Satu cara adalah dengan membangkitkan persoalan undang-undang seperti yang diarahkan oleh Aturan 33 Kaedah 2 (KMT) yang dibaca bersama dengan Aturan 18 Kaedah 11 (KMT) dan cara yang satu lagi adalah dengan memohon supaya pernyataan tuntutan dibatalkan di bawah Aturan 18 Kaedah 19 (KMT). Cara yang pertama adalah sesuai bagi kes-kes yang memerlukan hujah-hujah dan pertimbangan secara teliti. Cara yang kedua merupakan prosedur terus yang bersesuaian bagi kes-kes yang jelas dan nyata, supaya seorang Hakim boleh menyatakan dengan serta-merta bahawa pernyataan tuntutan itu mempunyai kekurangan bahkan jika dapat dibuktikan, akan membolehkan responden mendapatkan apa yang dipohon. Rayuan ini dipertimbangkan atas alasan bahawa ini adalah permohonan untuk perbicaraan permulaan isu-isu sebelum perbicaraan yang asal itu. Aturan 33 k.2 (KMT) adalah sesuai digunakan jika terdapat perkara undang-undang yang jika diputuskan dengan satu cara akan menentukan litigasi dan kesempatan kemudahan itu patut diambil.

[3] Definisi moden 'kausa tindakan' adalah situasi fakta yang kehadirannya membolehkan seseorang itu mendapatkan remedi terhadap seorang lain.

[4] Kewujudan perwakilan yang mempengaruhi responden supaya memasuki perjanjian usahasama, kewujudan 'collateral warranty' dan perhubungan fidusiari di antara pihak adalah isu-isu yang tidak boleh diputuskan dengan menggunakan Aturan 33 k.2 dibaca bersama

dengan Aturan 18 k.11 KMT tetapi adalah isu-isu yang perlu dibuktikan dengan keterangan ekstrinsik. Oleh itu perkara-perkara itu sewajarnya dibicarakan pada perbicaraan yang betul. Isu-isu dalam kes ini diselubungi dengan kerumitan dan fakta-faktanya juga dipertikaikan dan oleh itu rujukan kepada Aturan 33 k.2 tidak patut dibuat.

[5] Fasal 23 dalam perjanjian usahasama tidak mengandungi fasal *Scott lwn. Avery*. Oleh demikian soalnya adalah sama ada berdasarkan fasal 23, responden berhak di sisi undang-undang untuk pergi membawa ke Mahkamah sebagai ganti daripada merujuk kepada timbangtara pertikaian itu. Berdasarkan autoriti kes-kes adalah jelas bahawa responden masih boleh pergi ke Mahkamah dengan syarat sebelum memulakan tindakan, tiada award yang telah diberikan oleh penimbangtara sebelumnya.

[6] Kelakuan perayu dalam memfailkan afidavit jawapan kepada afidavit responden semasa mereka memfailkan isu-isu seperti yang diperintahkan oleh tuan Hakim dan memfailkan pernyataan pembelaan dan tuntutan balas adalah jelas dari jenisnya, berjumlah kepada penepian hak-hak pihak yang pergi kepada timbangtara. Perayu juga tidak merujuk kepada s. 6 Akta Timbangtara untuk membuat permohonan panggantungan prosiding dan ini mengesahkan hujah bahawa ia melepaskan hak untuk pergi ke timbangtara, tetapi telah menyerah diri kepada bidang kuasa Mahkamah.

[Bantahan ditolak: rayuan ditolak dengan kos.]

Cases referred to:

Booker v. Wilson [1982] 43 ALR 68 ***(dist)***
Brian Pty. Ltd. v. United Dominions Corporation Ltd. [1983] 1 NSWLR 490 ***(cit)***
Cooke v. Gill [1872-73] 8 LRCP 107 ***(cit)***
Dobbs v. The National Bank of Australia Ltd. [1935] 53 CLR 643 ***(cons)***
Everette v. Ribbands & Anor. [1952] 2 QB 198 ***(cit)***
Heyman & Anor. v. Darwins Ltd. [1942] All ER 337 ***(dist)***
Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 QB 86 ***(cit)***
James Birtchnell & Anor. v. The Equity Trustees, Executors & Agency Co. Ltd. & Anor. 42 CLR 384 ***(foll)***
Jenyns v. Public Curator (Q.) 890 CLR [1953-54] 113 ***(cons)***
Letang v. Cooper [1965] 1 QB 232 ***(foll)***
6 - New Zealand Netherlands Society 'Oranje Incorporated v. Kuys & Anor. [1973] 2 All ER 1222 ***(foll)***
Radstock Co-operative & Industrial Society Ltd. v. Norton-Radstock Urban District Council [1968] Ch 605 ***(foll)***
Read v. Brown [1889] 22 QBD 128 ***(cit)***
Scott v. Avery [1856] 5 HLC 811 ***(cit)***
Tufton v. Sperni [1952] 2 TLR 516 ***(foll)***
Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd. [1961] Ch 375 ***(foll)***

Legiaslation referred to:

Arbitration Act 1952, s. 6
Rules of the High Court 1980, O. 18 r. 11, O. 18 r. 19, O. 33 rr. 2, 5

Other source referred to:

Chitty on Contracts on General Principles (26th Edn.,) Vol. I

For the appellant - Lim Kean Chye (Haji Mohamed Ismail bin Mohd Shariff and K.H. Koh with him); M/s. Mohamed Ismail & Co.
For the respondent - G. Sri Ram (V. Manokaran with him); M/s. Wan Majid & Mano

JUDGMENT

Mohd. Jemuri Serjan CJ (Borneo):

This is an appeal against the judgment of Anuar J given on 21 March 1991 dismissing the appellant's application to dismiss the respondent's action commenced by Originating Summons No. C189/85. There were two objections raised by the learned Counsel for the appellant in the Court below:

(1) That the plaintiff was suing for payment of money while the contract was being performed, and

(2) That the plaintiff had not referred the dispute between the parties to arbitration.

For the sake of convenience, the term "appellant" is used as a reference to the defendant and the "respondent" to the plaintiff in Originating Summons No. C189/85. Before us, the learned Counsel for the appellant who also appeared for the appellant in the Court below advanced the same two grounds to support his arguments that this appeal should be allowed. He complained that the learned Judge was wrong in dismissing his objections, purporting to act under O. 18 r. 19 of the Rules of the High Court, 1980 because of the delay on the part of the appellant in making the application to strike out the suit. It would appear from the judgment that the learned Judge in fact decided that under O. 18 r. 19 the application should be made as early as possible and should not be made at a very late stage, particularly at a stage when the case was ready for trial. In this respect, we would point out that the learned Judge was led to believe that the application to dismiss the suit was indeed made under O. 18 r. 19 because the learned Counsel himself in his submissions before the learned Judge apparently relied on O. 18 r. 19 and on the ground that the cause of action was vexatious and frivolous. The notes of proceedings in the High Court provide evidence that O. 18 r. 19 was cited by the learned Counsel for the appellant. There was no indication from the notes of proceedings that the appellant's application was not made under O. 18 r. 19 and it made no reference at all to O. 33 r. 2. We are all familiar with O. 18 r. 19 and O. 33 r. 2 which do not deal with the same subject matter. If there is any assistance at all that could be obtained from the notes of proceedings in the lower Court on this aspect of the case it is to be found on p. 77 in Vol. I of the Record of Appeal where the learned Counsel for the respondent in his reply adverted to O. 33 r. 2 as being discretionary, perhaps, with some innate perspicacity he concluded that the appellant's case was one under O. 33 r. 2.

Rule 2 gives the Court discretionary power to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which a question or issue shall be stated. If the learned Counsel for the appellant relied on O. 33 r. 2, in the first place, there should be an application for an order under r. 2 and if the Court allows the application, then the Court may give direction as to the manner in which the question or issue shall be stated. From the notes of proceedings, there was no evidence of such application under r. 2 and no order expressly given and no directions as to the manner in which the question or issue is to be stated. It would appear as if at the hearing in the High Court on 26 November 1990, the learned Counsel for the appellant opened his case by stating the two preliminary objections, that is, arbitration and that the action is not sustainable and it would also appear that the Court allowed the learned Counsel to make submissions on the two objections without any regard to the provisions of the Rules of the High Court and, surprisingly, without objections by the learned Counsel for the respondent. This is another disturbing feature of this case. Under the circumstances, we do not consider that the learned Judge was wholly to be blamed for making the obvious mistake.

Secondly, the learned Counsel for the appellant complained that the learned Judge was wrong in holding that the appellant was relying on s. 6 of the Arbitration Act 1952 (Act 93) on the question of arbitration when the learned Judge said:

> ...if the defendants wish to have the matter referred to arbitration they should do so before taking any steps in the proceeding.

The learned Counsel also complained that the learned Judge was wrong in holding that the respondent had a cause of action in fiduciary duty without regard to the true nature of the claim of the respondent as was evident from the Originating Summons No. C189/85.

It is evident both from the notes of proceedings in the High Court and in the arguments of the learned Counsel for the appellant before us that the application in the lower Court was in respect of O. 33 rr. 2 and 5 read together with O. 18 r. 11 because at the time when this application was argued before the High Court, the pleadings had been closed and that the date of the trial of the issues had already been fixed. Furthermore, in the appeal before us, the learned Counsel for the appellant made no reference at all to O. 18 r. 19 nor O. 33 r. 2 but was arguing his case on the basis that there was no cause of action in the originating summons since the contract had not been terminated. It must have been in the mind of the learned Counsel for the appellant that it was too late for him to apply to strike out the originating summons under O. 18 r. 19 at that stage and the only proper recourse would be to apply for the trial of preliminary matter on the question of law before the trial of the issues. Hence, this application must come within the purview of O. 33 rr. 2 and 5 read together with O. 18 r. 11, although he never alluded to these two orders.

Two courses are open to the appellant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the respondent to relief. One method is to raise the question of law as directed by O. 33 r. 2 read together with O. 18 r. 11 and the other is to apply to strike out the statement of claim under O. 18 r. 19. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that a Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the respondent to what he asks. (See *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd.* [1899] 1 QB 86 per Lindley MR at p. 91). We would therefore consider this appeal and make our decision on the basis that this is an application for the trial of preliminary issues before the trial itself. We would interpolate to say that O. 33 r. 2 is suitable if there is a point of law which, if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities. (See *Everett v. Ribbands & Anor*. [1952] 2 QB 198 at p. 206 per Romer LJ).

It is pertinent at this stage to consider the nature of the suit under Originating Summons No. C189/85. This is a very unusual case with a chequered history to boot. Originally, the respondent took out a writ in Civil Suit No.30 of 1985 against five defendants *viz.* Newacres Sdn. Bhd., the present appellant, Chan Teik Huat, Metroplex Bhd. and Tan Sri Dato' Ibrahim bin Mohammed claiming, *inter alia*, against the appellant for:

(a) an account of all sums belonging to the plaintiff in the possession of or converted by the first defendant;

(b) an injunction perpetually to restrain the first defendant from selling, transferring, disposing of or encumbering such number of buildings and the land thereof as are lawfully due to the plaintiff and are under construction or to be constructed upon the said land;

(c) a mandatory injunction compelling the first defendant to transfer to the plaintiff all buildings and the land thereof to which the plaintiff is lawfully entitled.

On 10 January 1985 the respondent took out a notice of motion in the said Civil Suit No. C30 of 1985 seeking injunctions against the appellant and four other defendants in that suit. The motion for injunctions came on for hearing before Abdul Razak J on 21 January 1985 in open Court and a consent order was made staying the action upon certain terms. Term No. 4 of the consent order required the respondent to apply to the Court for an appropriate construction and interpretation of the joint venture agreement as to the respective entitlements of the parties thereunder, with liberty to the respondent to lead evidence on the existence or otherwise of a collateral contract and without prejudice to the rights of the appellant in respect thereto. Hence, pursuant to this order, the respondent took out the Originating Summons No. C189/85 on 2 October 1985. In this originating summons the respondent applied for the following reliefs:

(1) a declaration that upon a proper construction and interpretation of the joint venture agreement in writing dated 2 October 1980 and entered into between the plaintiff and the defendant abovenamed herein read together with the antecedent collateral agreement thereto, the plaintiff is entitled to a sum of not less than RM226,336,730.59 less all sums received by the plaintiff from the defendant as at the date of the order to be made upon this summons;

(2) alternatively, an order that the defendant do pay all monies or convey all lands and buildings that are due to the plaintiff upon a proper construction of the joint venture agreement in writing dated 2 October 1980 read together with the collateral agreement antecedent thereto;

(3) alternatively, for an order that this honourable Court do declare the entitlement of the plaintiff under the joint venture agreement dated 2 October 1980 read together with the collateral agreement antecedent thereto;

(4) an order that the defendant do pay interest on the amount determined to be due and owing to the plaintiff from the dates on which such sums became payable at a rate the plaintiff would have been able to secure from a commercial bank for fixed deposits; and

such further or other consequential orders or reliefs.

Consequent upon the issue of this originating summons, the appellant took out on 16 January 1986 a summons - in - chambers to strike out the respondent's originating summons. It was not clear under what order the appellant took out the originating summons, whether it was under O. 18 r. 19, or under O. 2. At the hearing of this summons in chambers, strangely enough, the then learned Counsel for the appellant, Mr. Chin Yew Meng, told the Court that he was not suggesting that the action be dismissed because no allegation of fraud or deceit was relied upon but merely suggesting that the matter be stayed and for questions to be formulated by the parties and hence no order was made on the appellant's summons to strike out the originating summons. Instead, by consent, the respondent undertook to file a list of issues and the appellant to file questions or issues which he considered relevant. On 17 January 1986, the managing director of the respondent filed an affidavit in compliance with the consent order made on 16 January 1986 setting out 17 issues which the respondent considered relevant for the determination by the Court, and on 18 February 1986, he filed another affidavit and included therein an additional issue so that by then the respondent had identified 18 relevant issues to be determined by the Court. Thereupon, the appellant also filed an affidavit in reply. Eventually, all in all there are 11 affidavits altogether from both parties containing replies and counter-replies.

Apparently, a meeting of the parties attended by the learned Counsel for the respondent and the appellant was called by Razak J on 27 November 1986. The learned Judge decided that since the dispute related to facts which were seriously disputed, he directed that the parties should exchange pleadings. Again, on 11 March 1987, the learned Judge called for another meeting of the learned Counsel for the respondent and the appellant and at that meeting he ordered the respondent to file a statement of claim and the appellant to file a statement of defence and counterclaim. On 27 March 1989, the respondent filed the amended statement of claim which runs into 19 paragraphs with several sub-paragraphs added to some of the paragraphs. The appellant filed his statement of defence on 28 November 1989 traversing the various issues raised in the amended statement of claim. There are 19 paragraphs in the statement of defence and several sub-paragraphs as well. On 24 January 1990, the respondent filed his re-amended reply and re-amended defence to set off the amended counterclaim running into 8 pages. Summons for directions were filed by the respondent and on 19 June 1987, an order was made, *inter alia*, that the suit would be set down for trial within 30 days from the date of the order. It was common ground that the pleadings had been closed and the date of the trial had been fixed. The application for the trial of preliminary issues before Anuar J was heard on 27 November 1990.

It is convenient at this juncture to revert to the statement of claim and to look at the nature of the reliefs claimed by the respondent and the grounds for the reliefs. The amended statement of claim contains 19 paragraphs with several sub-paragraphs added to some of the paragraphs and runs into 15 pages. The reliefs sought in the statement of claim are as follows:

(1) a declaration that the defendant has acted in breach of its fiduciary duties;

(2) a declaration that the plaintiff is entitled to receive from the defendant a sum of not less than RM189,341,378.88;

(3) alternatively, for an order that this honourable Court do assess a sum of money or other entitlement which the plaintiff is entitled to receive from the defendant;

(4) an order that the defendant do pay compound interest at the rate of 8% with monthly rests on the amount determined to be due and owing to the plaintiff from the dates on which such sums became payable on the footing of wilful default;

(5) a consequential order that the defendant do pay to the plaintiff (together with interest as aforesaid) all sums declared by this honourable Court to be so payable as aforesaid;

(6) costs of this suit;

(7) further or other relief.

The statement of claim itself includes by consent of the respondent the issues that were ordered to be formulated by Razak J on 16 January 1986. These issues appear in para. 18 of the statement of claim and there are 18 such issues.

For the purpose of this appeal, we do not consider it necessary to reproduce all the issues raised in the statement of claim but it would be sufficient just to refer to a few relevant issues which would determine whether the suit should be dismissed on point of law. Paragraph 8 of the amended statement of claim alleges that the respondent entered into the joint venture agreement and transferred the land to the appellant in reliance upon a representation and a collateral warranty by Tan Sri Ibrahim bin Mohammed and Chan Teik Huat, and by para. 18(a) and (b) the respondent raised the issue whether there is such a collateral agreement between the respondent and the appellant antecedent to the joint venture

agreement, and whether the respondent is entitled to a sum of RM226,336,730.59 after the deduction of a sum of RM46,910,651.12 which had already been paid by the appellant to the respondent. Paragraph 8 was supported by what the respondent described as **substance of case** where it was stated that (a) income tax of RM95,616,015 was levied on the respondent by the Department of Inland Revenue for the year 1981 on the basis that the respondent was entitled to receive from the appellant a sum of RM236,252,030, and (b) the respondent had received from the appellant a sum of RM46,910,651.12. By paras. 12 and 13, the respondent states that the dispute between the respondent and the appellant relates to the implementation of the joint venture agreement by the appellant, and by reason of the joint venture agreement and by reason of all the circumstances of the case, the appellant is, at all material times, under a fiduciary duty to act honestly, reasonably and fairly in all his dealings with the respondent. The respondent alleges that at all material times the appellant had acted in breach of his fiduciary duties and gives particulars thereof. By para. 17, the respondent contends that the appellant had acted in breach of his fiduciary duties owed by the respondent and therefore claims the sum of RM189,341,378.88. There are other issues in the statement of claim that had been traversed by the appellant which, in our view, by their very nature require proof by extrinsic evidence as they involve questions of fact as well and not solely questions of law.

It was the case of the appellant in the High Court which he assiduously maintains before us that as the contract in respect of the joint venture agreement entered into between the appellant and the respondent on 2 October 1980 where the appellant, referred to as the "developer", undertook to develop the land belonging to the respondent, has not been terminated, the respondent, strictly as a matter of law, has no cause of action. In other words, the cause of action is premature and therefore no relief in the form of payment of money can be made. There is no termination of the contract and neither is there a breach of the contract. It is still in force; at least in 1985 when the action was commenced by the respondent. In fact, the parties still go on with the contract as at the present moment.

The proposition advanced by the learned Counsel for the appellant is that a party to a contract cannot go to Court while a contract is being carried out and ask for payment without provision in the contract for him to do so. In this case there is no such provision in the agreement between the parties and in order to entitle him to damages for breach of contract, the respondent must first terminate or rescind the contract. The respondent's case, taking it at its face value and without examination, is at the very worst an allegation of anticipatory breach of contract by the appellant.

It was argued, therefore, by the learned Counsel for the appellant that there is no breach of contract where the matters complained of are anticipatory and therefore there is no cause of action. The corollary to this proposition is there are no damages available. It is clear that from the appellant's point of view the respondent's complaints and the existence and allegation of breach of fiduciary duties are nothing but red herrings, nebulous in character and lacking in specific details and particulars to constitute a cause of action.

We do not wish to go through the whole statement of claim and the statement of defence and the reply to the statement of defence and counterclaim because the appellant and the respondent had spawned a wide spectrum of complex issues which involve both question of law and question of fact. It would suffice to clarify here what seems to be a misconception on the part of the learned Counsel for the appellant. Nowhere in the statement of claim is there any claim for damages for the breach. What is clear from the statement of claim is that the respondent seeks a declaration that it is entitled to payment of a certain agreed sum on

the true construction of the joint venture agreement. When the payment is to be made, or whether the payment is due or not is another matter to be decided at the trial. We are only concerned here with whether the respondent has a cause of action.

It is not out of place to reiterate that at the meeting of the litigating parties on 27 November 1986 called by Razak J the learned Judge clearly informed the parties that their disputes involved facts which were themselves disputed and hence he ordered that they exchanged pleadings. It is the first indication that the matter before us is not a matter dealing solely with question of law, the determination of which would dispose of the suit. The respondent in para. 8 of the amended statement of claim alleges that it entered into the joint venture agreement and transferred the land to the appellant on account of a representation and a collateral warranty. Surely, this is a case where extrinsic evidence must be adduced and the truth or otherwise of the allegation be established. Secondly, with regard to para. 18(a) and (b) the question whether a collateral agreement between the parties exists or not is a matter to be proved by evidence and cannot be decided by looking at the agreement alone. Similarly, whether the respondent is entitled to a sum of RM189,341,378.88 after deduction of a sum of RM46,910,651.12 on the true construction of the joint venture agreement must, by its very nature, be proved by extrinsic evidence. The appellant argued that the respondent is not entitled to any payment because there is no provision for such payment in the agreement, but in this regard we are faced with the problem that in the statement of claim, the respondent claimed that he had received from the appellant a sum of RM46,910,651.12. If there is any substance in the learned Counsel's submissions on this question how this sum was paid in the first place must be explained *aliunde* and if such payment is disputed then again oral evidence is inevitable. These issues, in our view, would, by themselves, be sufficient to constitute a cause or causes of action to justify a trial. Similarly, whether the respondent is entitled to any relief consequent upon any declaration which the appellant may obtain is again dependent upon evidence to be adduced by the respondent and it would not be proper for us at this stage to make any observation on it.

The learned Counsel for the appellant disputed the existence of fiduciary duties arising out of the joint venture agreement and in fact in the appellant's statement of defence it averred that the agreement is not a true joint venture agreement but, in substance, a sale and purchase agreement for the sale of the said land by the respondent to the appellant where the purchase price is to be paid, partly in cash and partly in kind, that is, allocation of units of houses and other buildings to the respondent. Therefore, all the complaints made by the respondent in para. 13(b) of the statement of claim relating to the particulars of breach of fiduciary duties, particularly paras. (v) and (vi) could not be regarded as such breach. Paragraphs (v) and (vi) read as follows:

> (v) Taking steps to ensure that the plaintiff will receive little or no benefit from the said development by:
>
> (1) informing the plaintiff that there was no money due to it when in fact there was;
>
> (2) applying formulae to obtain for itself an unjust and undue benefit or income by way of interest;
>
> (3) depriving the plaintiff of interest lawfully due to it by concealing from the plaintiff the interest received by the defendant from defaulting purchasers of the buildings constructed on the said land.
>
> (vi) Placing a construction upon the terms of the joint venture agreement which to the knowledge of the defendant was wrong and thereby depriving the plaintiff of its entitlement under the joint venture agreement.

In any case it was argued that the law of fiduciary duty is not the same as the law of trust.

With respect to the question of fiduciary relationship between the parties, the learned Counsel for the respondent referred us to the definitions of "trust" and "trustee" in the Specific Relief Act 1950 (Act 137) where fiduciary ownership and fiduciary character are included. It is the respondent's case that a fiduciary relationship is established between the appellant and the respondent when they entered into the joint venture agreement. He supported his proposition by citing the Australian Supreme Court case of *Brian Pty. Ltd. v. United Dominions Corporation Ltd.* [1983] 1 NSWLR 490. Samuels JA at p. 506 says that after reviewing the authorities, he is of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member. In the same case Hutley JA at p. 496 has this to say on this subject:

> Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, *inter se*. In *Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd.* [1974] 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint venturers have fiduciary relations, *inter se* would seem to be essential for the efficacy of the device.

In the High Court of Australia case of *Jenyns v. Public Curator (Q.)* 90 CLR [1953-54] 113 Dixon CJ, McTiernan and Kitto JJ have this to say at p. 133:

> We are not here dealing with any of the traditional relations of influence or confidence - solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and *cestui que* trust. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.

The Judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Another v. The Equity Trustees, Executors and Agency Company Ltd. & Anor.* 42 CLKR 384, Dixon J at p. 407 explains the fiduciary relationship between partners and how the relationship is to be determined. This is what he says:

> The relation between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore v. Smith* [1890] 15 App. Cas 223 at p. 225; [1886] 35 Ch D 436 at p. 444. The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation *(Cassels v. Stewart* [1881] 6 App. Cas at p. 79). *The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm.* Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties. (Emphasis is mine).

That passage was approved by Lord Wilberforce in the case of *New Zealand Netherlands Society 'Oranje Incorporated v. Kuys & Anor.* [1973] 2 All ER 1222. At p. 1226 Lord Wilberforce says, after quoting the relevant passage of Dixon J's judgment:

This was said in the context of a partnership but the principle must be of general application.

We would, with respect, accept this proposition which goes to show that if the agreement of 2 October 1980 entered into by the litigating parties is indeed a joint venture agreement then their relationship is a fiduciary one. The question of the extent of the fiduciary obligations in this case, therefore, cannot be determined by submissions alone before us but must be ascertained from oral evidence as well as minute scrutiny of the relevant documents. The subject matter raised in paras. (v) and (vi) relating to the breach of fiduciary duties must, of necessity, be so determined. We would on this point quote Jenkins CJ in *Tufton v. Sperni* [1952] 2 TLR 516 at p. 530:

> It must be shown that the transaction in question did in fact arise out of some special relationship between the parties and that the relationship was a fiduciary one. Moreover, it must be shown not merely that there was a fiduciary relationship of some sort, but that the fiduciary relationship was of such a character as to warrant the interference of the Court. (*In re Coomber* [1911] 1 Ch 723).

Such matters as these must be decided at the trial proper and not to be dealt with under O. 33 r. 2. Perhaps, it would be enlightening if we say a few words on the meaning of the term "cause of action". In *Cooke v. Gill* [1872-73] 8 LRCP 107, Bovill CJ at p. 116 defines "cause of action" as follows:

> Cause of action has been held from the earliest times to mean every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse.

In *Read v. Brown* [1889] 22 QBD 128 at p. 131 Lord Esher MR has this to say on the real meaning of the phrase "cause of action":

> ...it has been defined in *Cooke v. Gill* LR 8 CP 107 to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

The modern definition of "cause of action" is, as stated in *Letang v. Cooper* [1965] 1 QB 232 at pp. 242-243 per Diplock LJ simply a factual situation the existence of which entitles a person to obtain from the Court a remedy against another person.

In the present appeal several issues which we have picked out of the statement of claim to be relevant for the purpose of this appeal in fact have been traversed by the appellant in the amended statement of defence. The existence of representation of Tan Sri Ibrahim bin Mohammed and Chan Teik Huat which induced the respondent to enter into the joint venture agreement, the existence of a collateral warranty and the fiduciary relationship between the parties are issues which cannot be decided by recourse to O. 33 r. 2 read together with O. 18 r. 11 of the Rules of the High Court, but are issues that must be proved by extrinsic evidence. As such, these are matters that ought to be tried at the trial proper. At this juncture it is pertinent to quote Sachs LJ in the case of *Radstock Co-operative & Industrial Society Ltd. v. Norton-Radstock Urban District Council* [1968] Ch 605. At p. 632 Sachs LJ says:

> In the category of cases which come before the Courts in an unsatisfactory form, the one now under consideration ranks high. Any preliminary issue which falls to be tried in the course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well-defined and that the facts upon which it has to be considered are clearly ascertainable. In the present case there is not simply a single point for consideration but a whole series, and no such care was taken as regards any of them; moreover, when the pleadings came to be amended in the middle of the trial before the Judge at first instance, the result was to make the matters less rather than more clear.

This is an apt quotation applicable in the present appeal. The issues in this case are riddled with complexities and the facts are in dispute so that recourse to O. 33 r. 2, in our view, should not be had in the first place. In this respect, the observation of Lord Evershed MR in *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* [1961] Ch 375 at p. 396 is appropriate to show that under certain circumstances O. 33 r. 2 is not the correct procedure to adopt:

> I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom - save in very exceptional cases - of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.

Although the learned Counsel for the appellant has vigorously and persuasively argued this appeal, we are unable to agree with him for the reasons we have explained above. We would, on this ground, dismiss the appeal on the first objection.

The second preliminary objection raised by the appellant is the question of the application of clause 23 of the joint venture agreement which provides for reference to arbitration in the case of any dispute or difference with regard to any clause, matter or thing whatsoever or the operation or construction thereof or any matter connected with the agreement, or the rights, duties or liabilities of any of the parties. Clause 23 reads:

> If any dispute or difference shall arise between the parties hereto touching any clause matter or thing whatsoever herein contained or the operation or construction thereof or any matter or thing in any way connected with this agreement or the rights duties or liabilities of any party under or in connection with this agreement then and in every such case the dispute or difference shall be referred to a single arbitrator in case the parties agree upon one (1) and otherwise to two (2) arbitrators, one (1) to be appointed by each party and in either case in accordance with and subject to the provisions of the Arbitration Act 1952 or any statutory modifications or re-enactment thereof for the time being in force.

This is a normal arbitration clause and there is nothing unusual about it. It must be stated from the outset that clause 23 of this agreement does not contain what is known as "*Scott v. Avery* clause". Therefore, any authorities on *Scott v. Avery* clause cases will not be relevant in this appeal. The appellant's argument is that since the respondent has never referred his disputes to arbitration as required by clause 23, then under the law if he does not do so he does not have a cause of action. This argument smacks of the *Scott v. Avery* clause situation whose effect is that no action lies for breach of contract until the matters in dispute have been submitted to arbitration unless the condition has been waived by the party relying on that clause.

To support his argument the learned Counsel for the appellant cited the case of *Dobbs v. The National Bank of Australasia Ltd.* [1935] 53 CLR 643 at p. 652 and *Booker v. Wilson* [1982] 43 ALR 68. With respect to the learned Counsel, *Booker v. Wilson* can clearly be distinguished on the facts of that case which bear no similarity to the present appeal. That case deals with an incomplete agreement on the question of the amount of rent on the renewal of a lease. A term of the agreement in that case provides that performance of the further application to renew the lease is conditional on the rent being fixed. It was decided in that case that there is an implied term in the lease agreement that the rent is to be referred to an arbitrator.

In his written submissions the learned Counsel for the appellant quoted an extract of the observations of Rich, Dixon, Evatt and McTiernan JJ in *Dobb's* case which reads:

> Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction. (*Scott v. Avery* [1856] 5 HLC 811).

This extract is applicable to the *Scott v. Avery* clause situation but is not an authority on the question whether the parties to an agreement are precluded from having recourse to the Court when there is a provision for reference to arbitration as in clause 23 of the joint venture agreement in this case where it does not stipulate that the parties unequivocally agreed that there shall be no right of action whatever till the dispute has been referred to arbitration. Therefore, with respect, this observation is not relevant to our case but, on the contrary, the decision in *Dobb's* case supports the respondent's case.

The real question for our determination is whether in the face of the provision of clause 23 the respondent is entitled in law to go to Court instead of referring the dispute to arbitration, considering that it does not contain the "*Scott v. Avery* Clause". *Dobb's* case itself would provide an answer to this case, particularly the part of the judgment which reads:

> What no contract can do is to take from a party to whom a right actually accrues, whether *ex contractu* or otherwise, his power of invoking the jurisdiction of the Courts to enforce it. *(Kill v. Hollister* [1746] 1 Wils. 129); *Thompson v. Charnock* [1001 ER 1310]; *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 KB 478). Accordingly, a contract providing for arbitration did not, apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer. (*In re Smith & Service and Nelson & Sons* [1890] 25 QBD 545 at p. 554, per Bowen LJ). But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action.

This observation clearly supports the proposition that the respondent can still go to Court, provided before the institution of an action, no award had been made by an arbitrator. In any case, clause 23 is never intended to oust the jurisdiction of the Court under any circumstances, and we agree that in this case it was not the appellant's case that the Court's jurisdiction was thus ousted. *Chitty on Contracts on General Principles* (26th Edn.,) Vol. I can throw some light on this aspect of the appeal. In para. 1072 under the heading "Resort to Court proceedings" it says:

> If, contrary to an agreement to refer a matter to arbitration, one party resorts to proceedings in an English Court in respect of that matter, the appropriate course is for the other party to apply for a stay of those proceedings. There is no principle that requires arbitration proceedings to terminate if a party to the arbitration resorts to Court proceedings. Nor does resort to Court proceedings by a party of itself constitute a repudiation of the arbitration agreement although it might do so if he thereby unequivocally demonstrates an intention to renounce or abandon the agreement.

From what we have said earlier on in the judgment it is indisputable that the appellant did not object to the recourse to Court by the respondent but went along throughout, not only filing affidavits in reply to the affidavits of the respondent when they filed the issues as ordered by Razak J but also filing the statement of defence and counterclaim. Such a conduct must, by its very nature, amount to a waiver of the rights of the parties to go to arbitration. Neither did the appellant have recourse to s. 6 of the Arbitration Act (Act 93) to apply for a stay of the proceedings thereby reinforcing the argument that it had abandoned its right

to go to arbitration, but submitted itself to the jurisdiction of the Court. In any event, even if the appellant were to apply for stay of the proceedings in the High Court under s. 6 of the Arbitration Act, his application would fail for the reason that he had taken various steps in the proceedings, and even had agreed for the case to be set down for trial 30 days from the date of the High Court order dated 19 June 1987. Under the circumstances, *Heyman & Anor. v. Darwins Ltd.* [1942] All ER 337 does not apply and can be clearly distinguished from this case. On the other hand, the case of *West London Dairy Society Limited v. Abott*, The Law Times, Vol. XLIV Ch D 376 is very much in point. The learned Judge, therefore, is perfectly right when he rejected this objection and we agree wholly with him on this issue.

Although the learned Judge in the Court below had not dealt with the various issues before him in detail, we, however, agree with his conclusion that the two objections should be dismissed. Under the circumstances, in the light of our observations in this judgment, we would dismiss this appeal with costs. The deposit is to be paid to the respondent on account of taxed costs.

Also found at [1991] 3 CLJ 2781